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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1963

No. 132

DON WILLIAMS, *Appellant,*

v.

THE CITY OF WICHITA, KANSAS, *Appellee.*

APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION TO DISMISS

FRED W. ALEY,
303 South Main,
Wichita, Kansas.

CHARLES S. RHYNE,
400 Hill Building,
Washington 6, D. C.,
Counsel for Appellee.

WILLIAM M. FERGUSON,
Attorney General for the
State of Kansas,
State House,
Topeka, Kansas.
Joining in this Motion
for the State of Kansas.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF KANSAS

MOTION TO DISMISS

Appellee, the City of Wichita, Kansas, pursuant to Rule 16 of the Revised Rules of this Court moves that the appeal herein be dismissed upon the ground that the appeal presents no substantial Federal question.

Questions Presented

1. Whether a state statute, enacted to prevent the exploitation or waste of water, denies a property owner due process and equal protection of the law under the Fourteenth Amendment to the United States Constitution when it establishes a procedure for the determination of rights and the payment of any compensation lawfully due?

2. Where the City of Wichita has a permit under this statute to appropriate underground water is a property owner entitled to an injunction ordering the City to abandon its statutory permit and to proceed by contract and condemnation?

Statute Involved

The Statute involved is entitled: "An act to conserve, protect, control and regulate the use, development, diversion and appropriation of water for beneficial and public purposes and to prevent waste and unreasonable use of water." This Statute is quoted in part in the Appendix to the Jurisdictional Statement. Particularly pertinent is § 82a-716 which provides in part:

> "If any appropriation, or the construction and operation of authorized diversion works, results in an injury to any common law claimant, such person shall be entitled to due compensation in a suitable action at law against the appropriator for damages proved for any property taken."

Statement

This is an appeal from a decision by the Supreme Court of Kansas[1] denying an injunction to prevent the City of Wichita from drilling and pumping water wells as authorized by the Kansas Water Appropriation Act. The statute, as its above quoted title indicates, creates a regulatory scheme to protect and preserve water resources in Kansas.

In *Baumann* v. *Smrka*, 145 F. Supp. 617, aff'd. 352 U.S. 862, it was held that this Act does not violate the Fourteenth Amendment.

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[1] *Williams* v. *Wichita*, 190 Kan. 317, 374 P.2d 578.

a. *The Background of the Water Appropriation Act*

The Kansas Water Appropriation Act was enacted in 1945. Prior to 1945, water rights in Kansas were governed by the common law. Percolating ground water was deemed to belong to the owner of the land in which it was found. A surface owner could take from beneath his soil any amount of water which he desired without regard to his neighbor, absent malice.

The unsuitability of such a rule to modern day conditions involving increased water needs and the harmful effects the unmodified common law would produce to the economy of the state became evident and in 1944 a state legislative committee was appointed to formulate a statute to provide for control of wastage of water, reasonable use of water, and remedies for any inequities to individuals caused by the new statutory controls. The Committee Report entitled "The Appropriation of Water for Beneficial Purposes" became the basis for enactment of the 1945 Water Appropriation Act, Kansas General Statutes 1949, § 82a-701 et seq.[2] The Act was premised on the policy that such water within the state of Kansas is dedicated to the people of the state, subject to the control and regulation of the state in the manner provided.

b. *Pre-1945 Vested Rights*

Under the statute any person who has been using water within three years prior to the 1945 Act is granted a right to continue such use. This right as statutorily defined is denominated a "vested right." G.S. § 82a-701(d). The extent of pre-1945 usage is a question of fact, the determination of which is made an administrative function of the

[2] Certain sections of the Act are set forth in the Jurisdictional Statement, pages 1a through 12a. References to the Kansas General Statutes, 1949, are indicated by "G.S."

Chief Engineer of the Division of Water Resources (G.S. § 82a-704), with a right of appeal to the State District Court, which adjudication expressly supersedes the administrative determination. G.S. § 82a-719. This statute also provides express protection for a domestic use including the irrigation of lands not exceeding a total of one acre. G.S. § 82a-701(c). Such domestic use to that extent is exempt from the requirement of obtaining an Appropriation Permit. G.S. § 82a-705.

c. *Permits for New Users after 1945*

All persons other than domestic users and those possessing the vested rights just described, who desire to utilize the natural water sources must apply for and obtain an Appropriation Permit. G.S. § 82a-711. If (a) the application contemplates the utilization of water for beneficial purposes within reasonable limitation; (b) the proposed use does not conflict with an existing use; and (c) the proposed use does not prejudicially affect the public interest, it is the *duty* of the Chief Engineer to approve the application and grant the Appropriation Permit. G.S. § 82a-711. An appeal to the State District Court is also provided from this action of the Chief Engineer as in the case of pre-1945 usage. G.S. § 82a-708(a).

d. *The Wichita Permit*

In 1952 the City of Wichita pursuant to the statute filed an application with the Chief Engineer of the Division of Water Resources for a Permit to drill and pump ten (10) wells here in question which are located upon tracts of land owned by the City. The Chief Engineer in due course granted an Appropriation Permit to the City.

The so-called Equus Beds, more correctly described as

pleistocene deposits, underlie portions of four Kansas counties, an area of approximately 2,340 square miles. These beds are an underground water reservoir composed of extremely permeable sand, gravel, clay and silt with a storage co-efficient of twenty per cent, that is, a cubic foot of material contains one-fifth cubic foot of water. The waters are percolating and hence migratory and fugitive.

The City of Wichita started pumping water from these Equus Beds in 1940, and there are now a total of 138 wells in the area of which 55 belong to the City of Wichita, 18 to other municipalities and 65 to various irrigators.

e. *Basis of the Appellant's Claim*

The Appellant owns an 80-acre tract of land about one and one half miles distant from the closest city well. His claim is not based upon the procedures or the remedies set forth in the statute. Appellant has not applied for a determination of his pre-1945 rights as provided under the statute. He claims that since his uses of water were by natural use through absorption by roots of plants rather than artificial uses through irrigation that he has no water right uses which are protected by the Act. He seeks to enjoin the City from drilling and pumping the water supply wells pursuant to its Permit, contending that the Water Appropriation Act is an unreasonable exercise of the State's police power and unconstitutional under the due process and equal protection clauses of the Fourteenth Amendment. Appellant contends that the City cannot appropriate water underlying the lands of others without obtaining the right to use and extract such water by contract or condemnation and seeks an injunction ordering the City to proceed by contract and condemnation rather than under the Statute.

The Supreme Court of Kansas in its comprehensive opinion (*Williams* v. *Wichita*, 190 Kan. 317, 374 P. 2d 578 (1962)) reviewed the common law and statutory law as to rights in Kansas in subsurface percolating waters and held that the Act did not violate the Fourteenth Amendment to the United States Constitution or any provision of the Constitution of Kansas and denied the injunction.

ARGUMENT

No Substantial Federal Question Is Presented by This Appeal

1. *The Kansas Water Appropriation Act Is A Proper Exercise Of The State's Police Power*

It has long been established that regulatory measures to protect water resources such as the Water Appropriation Act of Kansas are a proper and reasonable exercise of the police powers of the states. *O'Neil* v. *Northern Colorado Irrigation Co.*, 242 U.S. 20 (Colorado statute); *Dority* v. *State of New Mexico, ex rel John H. Bliss*, 55 N.M., 12, 225 P 2d 1007, Appeal dismissed, 341 U.S. 924 (New Mexico statute); *California-Oregon P. Co.* v. *Beaver Port. C. Co.*, 295 U.S. 142 (Oregon statute).

The principle that this Court will not substitute its judgment for that of the legislature on such a regulatory matter where, as here, such state action is reasonable and essential to protect the public interest, has been reaffirmed on numerous occasions. *Olsen* v. *Nebraska*, 313 U.S. 236; *Carolene Products Co.* v. *United States*, 323 U.S. 18; *Sage Stores Co.* v. *Kansas*, 323 U.S. 32; *Lincoln Fed. L. U.* v. *Northwestern*, 335 U.S. 525; *Breard* v. *Alexandria*, 341 U.S. 622; *Williamson* v. *Lee Optical*, 348 U.S. 483; *Ferguson* v. *Skrupa*, 372 U.S. 726.

Only recently with respect to the reasonableness of leg-

islative action this Court held in *Goldblatt* v. *Town of Hempstead*, 369 U.S. 590, 594:

> "The term 'police power' connotes the time-tested conceptional limit of public encroachment upon private interest. Except for the substitution of the familiar standard of 'reasonableness,' this Court has generally refrained from announcing any specific criteria."

In *Salisbury* v. *Maryland*, 346 U.S. 545, this Court held that the presumption of reasonableness applies to state statutes and the burden of proving unreasonableness is upon one who attacks such a statute. Here the water problems of Kansas obviously required state regulatory action and the Appellant has failed in his attempt to prove that the statutory scheme which Kansas has enacted is unreasonable in any respect. This Court held in *Carolene Products Co.* v. *United States, supra,* that an exercise of police power will be upheld if any state of facts either known or which could be reasonably assumed affords support for it, and the admitted facts amply support the exercise of the police power of Kansas for the purposes set forth in the statute here involved.

As indicated by the Supreme Court of Kansas in this case, *Williams* v. *Wichita*, 190 Kan. 317, 326, 374 P. 2d 578, 585, Kansas prior to 1945, was governed almost entirely by the common law with respect to water rights. The English or common law rule that percolating ground water "belongs" to the owner of the land in which it is found applied. As a result of the unsuitability of the common law doctrine with respect to present day necessities concerning the rights to and uses of water, and in particular with respect to percolating water, Kansas, like other states, has adopted legislation with respect to sub-surface

waters.[3] The state, under its police power, has ample authority to enact a change in the common law when the public interest so requires. *O'Neil* v. *Northern Colorado Irrigation Co., supra; United States* v. *Gerlach Live Stock Co.*, 339 U.S. 725. The right to change the common law was also preserved by early legislation in Kansas. G.S. §77-109, first effective October 31, 1868.

Not only adjoining landowners, but the public at large, have an interest in the preservation of natural resources such as oil, gas, subterranean water and timber, sufficient to justify appropriate legislation to prevent exploitation or waste thereof by the owners of land on which they are found. *Ohio Oil Co.* v. *Indiana*, 177 U.S. 190; *Lindsley* v. *Natural Carbonic Gas Co.*, 220 U.S. 61; *Walls* v. *Midland Carbon Co.*, 254 U.S. 300; *Bandini Petroleum Co.* v. *Superior Court*, 284 U.S. 8 More specifically, statutes limiting or controlling the exploitation or waste of natural resources have been upheld as against the constitutional objection that they transcend the police powers of the states. *Walls* v. *Midland Carbon Co., supra.* Such statutes have been sustained as against the objection that they constitute a taking of property without due process of law. *Ohio Oil Co.* v. *Indiana, supra; Lindsley* v. *Natural Carbonic Gas Co., supra; Walls* v. *Midland Carbon Co., supra; Bandini Petroleum Co.* v. *Superior Court, supra.* And such statutes have been upheld as against the contention that they deny equal protection of the laws. *Lindsley* v. *Natural Carbonic Gas Co., supra; Walls* v. *Midland Carbon Co., supra.*

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[3] Seventeen western states have enacted laws embracing the appropriation doctrine. See 1 Kinney (2d Ed.), *Irrigation and Water Rights*, § 587, pp. 1009-1011. Twelve of those states now have statutes applying the appropriation doctrine to percolating ground waters. See Hutchison, *Ground Water Legislation*, 30 Rocky Mt. L.Rev. 416.

The enactment of the Kansas Water Appropriation Act is directly related to the protection of the public health, safety and welfare. The decisions of this Court have so frequently and so clearly sustained this statutory exercise of the police power as to render insubstantial the claims of Appellant herein.

2. *The Fourteenth Amendment Is Not Violated By Provision Of The Law Of Kansas Relative To Rights In Percolating Waters*

Prior to 1945, under the common law rule in Kansas, a landowner could take from beneath his soil any amount of water which he desired without regard to his neighbor absent malice. He had the right to use as much of the water beneath his land as he could reduce to possession and his neighbor possessed the same right. He did not have a right to restrain his neighbors in any way and they did not have the right to restrain him. It might therefore be said that neither the Appellant nor his neighbors had any absolute water rights.

The unsuitability of this rule to modern conditions resulted in an exercise of the police power of the state of Kansas and the adoption of the Water Appropriation Act. Under the Act, the beneficial use which the property owner makes or has the right to make of the percolating water is the important phase of his water rights. As stated by the Kansas Supreme Court in this case:

> "Hence, it may be said that the appropriation doctrine and the rule of priority of right were intended to apply only to such water as was not being beneficially used as of the time of the passage of the act; i.e., to our undeveloped and consequently unused water resources."

(*Williams* v. *Wichita,* 190 Kan. 317, 334, 374 P. 2d 578, 591).

Under the statute, any person who had been using water within three years prior to 1945, was granted a right to continue such use as a "vested right". The Chief Engineer was charged with the responsibility of making an order determining the rights of persons making beneficial use of water on or before June 28, 1945, and the extent of their use. G.S. § 829-704. Any water user who deems himself aggrieved by such order is granted an appeal to the State District Court. Appellant in no way attempted to assert such a right. He ignores the statute and urges that the City be enjoined from proceeding except by contract or condemnation.

It should also be noted that the Act itself is not the *source* of vested rights and the extent of pre-1945 usage is a *question of fact,* the determination of which is made an administrative function of the Chief Engineer of the Division of Water Resources His powers and duties in such respect are specifically provided. G.S. § 82a-704. His administrative determination is final unless the right of appeal to the State District Court is exercised. G.S. § 82a-704. Other protections and priorities are also established. G.S. § 82a-717a, 82a-719, 82a-701, 82a-705, 82a-707(b).

Under the Act all persons other than domestic users (not applicable to Appellant) and those possessing vested rights who desire to utilize natural water sources must apply for and obtain an Appropriation Permit from the Chief Engineer. G.S. § 82a-711. This is the part of the Act under which the City of Wichita proceeded herein. The statute provides that if, (a) the application for the Appropriation Permit contemplates the utilization of water

for beneficial purposes within reasonable limitations; (b) the proposed use does not conflict with an existing use; and (c) the proposed use does not prejudicially affect the public interest, it is the *duty* of the Chief Engineer to approve the application and grant the permit. G.S. § 82a-711. It is also provided that if the Chief Engineer improperly or erroneously refuses the permit, the rejected applicant may have his day in court by appeal to the State District Court (G.S. § 82a-708(a)), and the adjudication of that tribunal is binding on the Chief Engineer and all water users. G.S. § 82a-719. The statutory scheme is thus comprehensive and reasonable in all respects in seeking to protect all who are affected.

Under the Kansas common law, Appellant's use of water was subject to being diminished with impunity by any neighbor pumping water from beneath his own land and reducing the water table under Appellant's land. Indeed, the Water Appropriation Act gives the Appellant a right to commence an action for damages, which he did not possess prior to 1945. G.S. §§ 82a-716, 82a-721(a).

The Appellant's contention that the Water Appropriation Act violates the Due Process Clause and the Equal Protection Clause of the Fourteenth Amendment of the United States Constitution is therefore without substance. As stated by the Supreme Court of Kansas in this case (*Williams* v. *City of Wichita*, 190 Kan. 317, 340, 374 P.2d 578, 595):

> "The Act, regulatory in purpose and nature, requires that water users make application and furnish information to the chief engineer of the Division of Water Resources, concerning the proposed use (§ 82a-709). Such a requirement is not a confiscation of water rights by legislative fiat. Rather, it is a proper and reasonable exercise of the police power of the state in con-

> trolling water use for the purpose of preventing waste and to conserve a valuable natural resource."

The Court went on to state that:

> "If he (Appellant) thinks he has been damaged by the pumping of the ten water supply wells in question, the Act gives him a right to commence a suit for such damage (§ 82a-716, 721(a))." *Williams* v. *City of Wichita,* 190 Kan. 317, 341, 374 P.2d 578, 595.

The determination by the Supreme Court of Kansas of the proper interpretation and application of a Kansas statute and the facts on which it founded its judgment are controlling in this Court in reviewing such judgment. *General Trading Company* v. *State Tax Commission,* 322 U.S. 335; *Fox River Paper Co.* v. *R.R. Commission of Wisconsin,* 274 U.S. 651; *Scripto* v. *Carson,* 362 U.S. 207.

The Appellant has clearly defined rights and adequate remedies under the Water Appropriation Act, but he failed to avail himself of them. Such failure to exhaust prescribed procedures and remedies makes this appeal insubstantial and is grounds for dismissal. *Burrill* v. *Locomobile Co.,* 258 U.S. 34. As Mr. Justice Cordozo said in *Utley* v. *St. Petersburg,* 292 U.S. 106, 109, when an administrative remedy has been given by a state statute and ignored by the objector, this Court will not undertake to review a decision by a state court adverse to the objector, citing *Milheim* v. *Moffat Tunnel Improv. Dist.,* 262 U.S. 710, *Farncomb* v. *Denver,* 252 U.S. 7, *Porter* v. *Investors Syndicate,* 286 U.S. 461.

Furthermore, in *Baumann* v. *Smrka,* 145 F.Supp. 617, affirmed 352 U.S. 863, the Court was concerned with the same Equus Beds and the same city water wells under the Kansas Water Appropriation Act as it existed prior to the

1957 Amendments.[4] The Court held that the Act in question does not violate the Fourteenth Amendment to the United States Constitution and that the state had the power to depart from the common law doctrine of reparian rights and establish the doctrine of appropriation and application to beneficial use. The Court declared at page 625 that:

> "There is no vested right in the decisions of a court and a change of decision does not deprive one of equal protection of the laws or property without due process of law.
>
> "Even though prior decisions of a state court have established a rule of property, a departure therefrom in a subsequent decision does not, without more, constitute a deprivation of property without due process of law under the Fourteenth Amendment.
>
> "The Fourteenth Amendment in guaranteeing equal protection of the laws does not insure uniformity of judicial decisions or immunity from judicial error. Likewise, it is well settled that a legislature may change the principle of the common law and abrogate decisions made thereunder when in the opinion of the legislature it is necessary in the public welfare.
>
> "Adequate water supply is a necessity. In the arid and semi-arid regions of the West it is imperative that all available water be utilized beneficially and without waste. The accomplishments of those ends is well within the competency of the legislature.
>
> "Plaintiffs have not seen fit to invoke the remedies afforded them by the Act. Those remedies are ade-

[4] The Amendments were primarily procedural and do not affect the substance of the Act. Compare the Act as summarized at 145 F. Supp. 621-623 with the present Act at Jurisdictional Statement, pages 1a through 12a.

quate, we think, to afford protection to any vested rights of the plaintiffs."

The decision in the *Baumann* case, affirmed by this Court, clearly applies in the instant case. We submit that the same facts and issues in the *Baumann* case constitute a prior controlling decision which is in accord with the decision of the Supreme Court of Kansas. No substantial Federal question forming a basis for review by this Court of the decision of the Kansas Supreme Court is presented by the contention of invasion of constitutional right, where the question raised has already been settled by previous decisions of this Court. *O'Neil* v. *Northern Colorado Irrigation Co., supra; California Oregon P. Co.* v. *Beaver Port. C. Co., supra; Dority* v. *Bliss, supra;* and *Utley* v. *St. Petersburg, supra.* Where a Federal question has been so explicitly foreclosed by prior decisions, it affords no basis for a writ of error from this Court to a state court. *Leonard* v. *Vicksburg, S. & P. R. Co.*, 198 U.S. 416.

It is also to be noted that the waters involved in this case were clearly established by the record to be percolating ground waters. The Supreme Court of Kansas held that the record would not support any contrary finding.[5] The law of Kansas with respect to water would

[5] 190 Kan. 317, 325; 374 P.2d 578, 585: Appellant attempts at pages 6 and 7 of the Jurisdictional Statement to characterize this water deposit as an underground stream despite the clear holding of the Supreme Court of Kansas. In so doing, Appellant, as part of his Statement, refers to Stramel, *Progress Report on the Ground Water Hydrology of the Equus Beds Area*, Kansas Bulletin 119, Part 1, State Geological Survey of Kansas, Univ. of Kansas Publications, (1956), hereinafter referred to as "Bulletin," as being a part of the record. Contrary to Appellant's statement, this Bulletin was *not* introduced into the trial record. R. 36. It was neither designated by appellant as a part of the record to be certified nor was it so certified by the Clerk of the Supreme Court of Kansas and

always have permitted the City to pump all the water it desired without being subject to an injunction. *City of Emporia* v. *Soden*, 25 Kan. 588, 37 Am. Rep. 265. In this respect, the Kansas law would remain unchanged (*Williams* v. *City of Wichita, supra,* at 331) and no injunction could issue here even if the Act were stricken as unconstitutional.

Conclusion

For the foregoing reasons, this appeal should be dismissed as no substantial Federal question is presented.

Respectfully submitted,

FRED W. ALEY,
303 South Main,
Wichita, Kansas.

WILLIAM M. FERGUSON,
Attorney General for the
State of Kansas,
State House,
Topeka, Kansas.

CHARLES S. RHYNE,
400 Hill Building,
Washington 6, D. C.

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therefore, should not be considered by this Court as a part of the record. It is the testimony of the author of this Bulletin which clearly establishes the deposit as percolating ground water. R. 44.